

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

KAISER FOUNDATION HEALTH PLAN OF COLORADO,

Employer,

and

Case 27-RC-7964

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL NO. 7

Petitioner.

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Undersigned.

Upon the entire record in this proceeding, the Undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act for the following reasons:

The Employer is a Colorado non-for profit corporation providing predominately prepaid comprehensive health care services to its members in the Denver, Colorado metropolitan area.¹ Services include outpatient care, inpatient hospital services and other benefits, such as pharmaceuticals, durable medical equipment, contact lenses and eyeglasses.

Medical and other health care services are obtained at the Employer's eighteen outpatient medical offices. Other of the Employer's facilities provide administrative or support services to the medical offices. These include a regional support services facility, which houses the Employer's optical laboratory, pharmacy operations, medical reference laboratory and storerooms.

As amended, the Petitioner seeks to represent a unit consisting of three job classifications in the Employer's Eye Care Department's medical office facilities: certified optical dispensers, optical dispensers, and the area team leader. These classifications are involved in the dispensing of contact lenses and eyeglasses. These employees, 29 in number, are organizationally placed in

¹ The Employer stipulated at the hearing that the Board had jurisdiction over its operations. The parties stipulated that during the past 12 months, the Employer has had gross revenues valued in excess of \$250,000, and, during that same period of time, received revenues valued in excess of \$5,000 from the Medicare program.

the Employer's Eye Care Department, which employs approximately 138 nonsupervisory employees, including professionals.

The Employer employs approximately 3,500 employees at its various offices in numerous job classifications. The Petitioner currently represents approximately 1,000 professional employees in two different units. Eye care professional employees are among the represented professionals. Another labor organization, Service Employees International Union, Local 105, represents approximately 1,600 of the Employer's nonprofessional health care employees in a broad unit. All three bargaining units are multi-facility units, including employees in covered classifications at all of the Employer's facilities in the Denver metropolitan area. The Petitioner currently represents no non-professional employees of the Employer.

Local 105 currently represents 66 technical, service and clerical employees in the Eye Care Department within the above-described single unit. Including the 29 employees sought to be represented by the Petitioner, there are 41 unrepresented technical health care employees in the Eye Care Department. The remaining 12 technical optical employees not sought by the Petitioner work in the lab or stockroom in the support facility. The 41 eye care employees are the only unrepresented employees of the Employer engaged in health care related work, who are eligible for representation (i.e., other than supervisors, confidential employees, etc.).

The Petitioner argues the petitioned-for unit is, in and of itself, appropriate. The Employer argues the petition should be dismissed, as only Local 105 can

represent such residual service and technical health care employees in the Eye Care Department (and Employer-wide) and because such a unit would result in undue proliferation of bargaining units in a health care industry employer. In the alternative, the Employer argues any appropriate unit must include all 41 unrepresented technical health care employees and not solely the 29 sought by Petitioner.

The parties agree that the petitioned-for employees are technical employees, as are many of the employees currently represented by Local 105 in the Employer-wide unit. The Petitioner argues, however, that the employees share a unique community of interest and, therefore, should be found to constitute an appropriate unit.

The Employer operates vision care services as a single regionwide Eye Care Department. Vision services are provided at ten of the Employer's medical offices. At each facility two services are provided: optometry (or ophthalmology) and optical. In five medical offices, optometry and optical are adjacent to one another. In one medical office, they are across the hall from each other. In the remaining four offices, they are located down the hall or on another floor.

The lab and stockroom, located in the support building, support both optometry and optical. The primary function of lab employees is to fabricate eyeglasses or contact lenses prescribed by optometrists or ophthalmologists. Stockroom employees provide supplies and equipment for all eye care locations. These employees have little patient contact. There is no interchange between

the lab and stockroom employees and the dispensers. When dispensers need a temporary replacement, they are replaced by other dispensers.

Five eye care supervisors are responsible for the eye care staff, both optometry and optical, with each supervisor being responsible for one to three of the medical offices. Lab employees are supervised by the optical lab supervisor. Stockroom employees are supervised by the stockroom supervisor. All seven managers report to the eye care business manager.

A patient receiving a prescription for contact lenses will be assisted by a dispenser in optometry. The dispenser will help the patient to select a type of lens, obtain proper measurements, prepare the order and engage in patient education. A patient receiving a prescription for eyeglasses will receive assistance from the optical area. The dispenser will assist the patient in the same manner as those patients receiving contact lenses. The eye glasses or contact lens order will be sent to the lab where the fabricating is performed. All employees in the Eye Care Department, regardless of job classification, have some clerical responsibilities, complete reports or other paperwork, assist in making appointments, and interact with other department employees on an as-needed basis.

As technical employees, the dispensers are required to have a high school education or its equivalent and job experience or further vocational training. This is true of other technical employees throughout the Employer, including the technical employees currently represented by Local 105 working in the Eye Care Department and elsewhere. Certification by passing an exam is required for

higher level positions among several technical positions, including the certified optical dispensers at issue and certified ophthalmic assistants and certified ophthalmic technicians already represented by Local 105. Production workers and the optical editor, who constitute the lab and stockroom staff, are required to have dispensing experience.

All unrepresented employees receive the same benefits, including vacation, sick leave, health coverage and other insured benefits and retirement. All are subject to the same personnel policies. Wages range from \$9.46/hour to \$17.54/hour. Local 105 represented employees receive wages ranging from \$9.96/hour to \$16.40/hour.

The record shows the dispensers work in close proximity to several employees, including other technical employees currently represented by Local 105 and all share the same supervision. The dispensers and other technical employees represented by Local 105 work the same hours and have no significant difference in their wage rates. These employees are subject to the same departmental policies, and they support the same professional staff. The basic education, training, and certification are comparable, and, in some cases, identical. Optical lab production workers and the optical editor share in this community of interest. Although located in a different facility, the optical lab production workers and the optical editor share the same departmental supervision with the optical dispensers. The dispensers are scattered throughout the metro area and, hence, do not ordinarily work together either. Wages and benefits are identical for the dispensers and lab employees. They are subject to

the same Employer policies. Significantly, work experience in optical dispensing is one of the basic qualifications to work in the lab. Based on the foregoing, I find the dispensers and the optical lab employees share a community of interest with the service and technical employees represented by Local 105 and do not have a sufficiently distinct community of interest to justify a separate unit. This is particularly true, where, as here, they are employed by a health care industry employer and where all but a few of similarly situated employees are represented in an Employer-wide unit. Thus, I find the 41 remaining employees must be considered a residual unit of the present unit represented by Local 105.

Levine Hospital of Hayward, 218 NLRB 327 (1975), sets forth the applicable law to be applied in circumstances as those existing here. In **Levine**, a non-incumbent union sought to represent a residual unit of an Employer engaged in the health care industry. The Board found that to hold such a unit to be an appropriate one would unduly proliferate the number of units in a health care industry. Consequently, the petition was dismissed. As in **Levine**, the Petitioner here is a non-incumbent labor organization² seeking to represent a residual unit of 29 to 41 technical employees where the incumbent union, Local 105, currently represents 1600 employees, many of whom are technical employees and work side by side with the requested employees.

The Board recently addressed the continued vitality of **Levine** in **Crittenton Hospital**, 328 NLRB 1 (1999). The Board specifically stated: We leave to another day the question whether a non-incumbent union may represent a residual unit of employees in the healthcare industry. Fn. 9 at p.3.

² The fact that the Petitioner represents certain of the Employer's professional employees in a professional unit does not distinguish this case from Levine, since a nonprofessional group of employees cannot be residual to a professional unit.

Consequently, **Levine** is still the applicable standard and must be adhered to in the instant matter.

The Board in **Levine** found that the only means by which the residual employees could be represented would be either through a petition for an overall unit or a petition by the incumbent representative of the existing unit to add the residual employees to that unit. As the Petitioner has indicated it does not wish to proceed to an election in such an overall unit, the petition must be dismissed. Accordingly, I shall dismiss the petition filed in this matter.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by October 28, 1999.

Dated at Denver, Colorado, this 14th day of October, 1999.

B. Allan Benson, Regional Director
National Labor Relations Board
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